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THE POLICE POWER, A PRODUCT OF THE RULE OF REASON.

A WELL-KNOWN writer on the police power calls it "The law of overruling necessity,"[1] and he adds:

"The law of necessity has been stated to be an exception to all human ordinances and constitutions, yet has been frequently decided to be subject to the law of reason, and subject to the control of the courts."

It would be more accurate to say that the entire doctrine of the police power of the states is the creation of the courts, evolved from the necessity of harmonizing provisions of written constitutions of states and nation with the imperative needs of civilized society. It is the result of the application of the "rule of reason" in the construction of written constitutions. For the absence of exact definitions of such words as "to deprive," "liberty," "property," "due process of law," "equal protection of the laws," "privileges and immunities," and the like, in constitutions,[2] left room for but one conclusion, to paraphrase the language of the Chief Justice in the Standard Oil Case,[3] which is, that it was expressly designed not to unduly limit or extend the application of the constitution by precise definition, but, while fixing a standard, that is, by declaring the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the

[1] W. P. Prentice, The Police Power, p. 6.

[2] See Francis J. Swayze on the Fourteenth Amendment, 26 HARV. L. REV. 1.

[3] Standard Oil Co. *v.* United States, 221 U. S. 1, 63.

light of reason, guided by the principles of law, and the duty to apply and enforce the public policy embodied in the constitution in every given case, whether any particular act of a legislative body was, within the contemplation of the constitution, permitted or forbidden. That is to say, the rule of construction, to be applied to constitutions as well as to statutes, must be the spirit and intent of the people or their representatives, and therefore the prohibition of a constitution must be held to extend to acts "even if not within the literal terms" of the constitution, "if they are within its spirit, because done with an intent to bring about the harmful results which it was the purpose of the" constitution to prohibit.[4] And on the other hand, that such prohibition must not be held to extend to acts which, while within the literal terms of a constitutional prohibition, could not have been intended by the people to be prohibited to legislative competence, because of the obvious injury to public interests which would result from such prohibition.

The inhabitants of the thirteen original states of our federal union, with common accord, embodied their conceptions of proper governmental organization in written constitutions, carefully devised to insure the expression and limitations of the powers of government, and the distribution of those powers among three distinct, although coördinated, branches. "The theory of our government, state and nation, is opposed to the deposit of unlimited power anywhere."[5]

In almost every one of these constitutions there was embodied a bill of rights — an enumeration of the rights which the people intended to secure to every individual of the community, for his protection in his life, his liberty, his right to labor in his own way, and the protection of the property which should be the fruit of his labor. These provisions, more or less detailed in the constitutions of the different states, were designed to restrict and control the activities of the legislative and executive branches of the government, and thus to secure the blessings of civil liberty to the people of those states and their posterity.

"Civil liberty," said Judge Sharswood, "the great end of all human society and government, is that state in which each in-

[4] United States *v.* American Tobacco Co., 221 U. S. 106, 177.

[5] Loan Association *v.* Topeka, 20 Wall. (U. S.) 655.

dividual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained except by equal, just, and impartial laws."[6]

The constitution of Massachusetts expresses in perhaps greater detail than any other those provisions by which the solicitude of its framers intended to accomplish the great ends they had in view. The preamble recited the duty of the people in framing a constitution of government to be

> "To provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may at all times find his security in them."

In the first part of the constitution there was set forth in great detail the rights of the people collectively, and of the citizens individually. "Each individual of society," it was declared, "has a right to be protected by it in the enjoyment of life, liberty, and property according to standing laws." And every one "ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character" (paragraphs X, XI).

It was also declared, in the familiar language derived from Magna Charta, that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Finally, it was declared to be "essential to a preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice" (paragraphs XII, XXIX).

The fact that the Constitution of the United States, as originally framed, contained no bill of rights, was the subject of serious complaint, and the first Congress, on September 25, 1789, adopted and proposed to the legislatures of the several states ten amendments, which were ratified between that date and December 15, 1791. These amendments embodied, as restrictions upon the action of the federal government, many of the provisions familiar to all

[6] 1 Sharswood's Blackstone, 127, note 8.

the state constitutions, imposing restraints upon action of the state governments.

It seems incredible that any intelligent student of government should have questioned the power and duty devolved upon the judiciary by these constitutions to inquire, when a question arose in a case coming before the courts, whether or not an act of the legislature, or of the Congress, violated some express provision of fundamental law. Not only was such a duty the necessary result of the establishment of constitutions purporting to regulate or circumscribe legislative action, and granting to the courts exclusive judicial power, but the constitutions of four of the New England states contained express provisions authorizing the legislature, or the governor, for their guidance in keeping within the constitutional bounds applicable to their respective functions, to require the opinions of the justices of the highest court of the state upon important questions of law, and upon solemn occasions.[7]

No such provision, however, being found in the Constitution of the United States, the justices of the Supreme Court from the very beginning declined to answer questions at the request of the executive, holding that the exercise of judicial power required them merely to decide questions or controversies coming before them in the course of the ordinary administration of justice.[8] But the court also held that when such questions arose in such cases or controversies, they would not hesitate to measure a law invoked in support of any given act with the constitution of the state or nation from which the power to legislate was derived, or by which it was qualified or restrained, and to declare it to be invalid if it exceeded the limits expressed in such grant or regulation.[9]

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[7] See Const. of Mass., 1780, ch. 3, art. 2; Const. of Maine, 1819, art. 6; Const. of New Hampshire, 1902, art. 73; Const. of Rhode Island, 1842, art. 10.

Similar provisions were embodied in the Const. of South Dakota, 1889, art. 5, § 13, and that of Missouri prior to 1875 contained a like provision. See note to 1 Thayer's Cases on Const. Law, p. 175.

By the Supreme Court Act (1875) of Canada, as amended by 54 & 55 Vict., ch. 25, the Governor-General in Council, and in some cases the Senate or the House of Representatives of the Dominion Parliament, are empowered to call upon the justices of the Supreme Court for opinions on questions of law.

[8] Marshall's Life of Washington, vol. v, 441; Sparks's Life of Washington, vol. x, 359.

[9] Marbury *v.* Madison, 1 Cranch (U. S.) 137, 177.

The opinion of Chief Justice Marshall in Marbury *v.* Madison, the case referred to, for a century has been followed by the Supreme Court. Its reasoning has never been answered. The courts of the states and of the nation have uniformly recognized and discharged the duty of passing upon the constitutionality of acts of state or national legislatures respectively, when they arose in cases coming before them. In no other way could the mandates of constitutions have been made effective; in no other way, certainly, could the supremacy of the federal Constitution have been maintained — a supremacy which was declared in the language of the Sixth Article:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The existence of this power and duty was universally accepted[10] despite the partisan outbreak of Mr. Jefferson after the decision in Chisholm *v.* Georgia in 1793, and by Andrew Jackson a quarter of a century later, until very recent times, when, for similar reasons, — namely, because the construction put upon constitutional provisions by the courts offended a radical faction of the community,— a renewed and even more violent assault was made upon the exercise of this judicial power.

With great subtlety, but with singular inaccuracy, the most conspicuous leader of this attack has characterized the action of the judiciary in holding state statutes unconstitutional, to be the performance, not of the ordinary judicial function, but of "the function which no other judge in the world performs of declaring whether or not the people have the right to make laws for themselves on matters which they deem of vital concern." [11]

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[10] Mr. C. A. Beard, in an article entitled "The Supreme Court, Usurper or Grantee," in the Political Science Quarterly, for March, 1912, p. 1, has amply demonstrated the fact that all of the framers of the federal Constitution whose views on the subject are recorded recognized that the necessary effect of its provisions would be to empower the judiciary to declare void any acts of Congress or of state legislatures which would violate the limitations imposed by the Constitution.

[11] "Judges and Progress," by Theodore Roosevelt, The Outlook, Jan. 6, 1912.

The statement is wide of the fact. In nearly every one, if not all, of the English colonies whose governments are embodied in written constitutions by which a separation is effected between the executive, legislative, and judicial functions, the courts of the colonies exercise power to pass upon the constitutionality of acts of the legislature, and their decisions are, under certain conditions, subject to review by the Judicial Committee of the Privy Council in England.

Thus, in Buckley *v.* Edwards, L. R. [1892] A. C. 387, the Privy Council held an act of the legislature of New Zealand to be invalid because unauthorized by the constitution of that colony.

In Webb *v.* Outrim, [1907] App. Cases, 81, on appeal to the Privy Council from a decision of the Supreme Court of Victoria, the powers of that colony under the constitution of the Commonwealth of Australia were considered, and it was held that the Parliament of the Commonwealth had no power to take away from the colony the right to appeal to the King in Council existing in that case; and the power of the colony, under the constitution to impose an income tax, even on the salary of an officer of the Commonwealth, was considered and determined.

Very recently the Privy Council in England, on appeal from the Supreme Court of Canada from opinions given by it in answer to questions submitted by the Governor-General in Council concerning the power of the Dominion to enact a law relating to solemnization of matrimony, gave authoritative construction to certain sections of the constitution of the Dominion of Canada (The British North America Act, 1867, secs. 91 and 92), and defined the limits of Dominion control over provincial legislation on the subject of marriage.[12]

The same power is constantly exercised by the Supreme Court of Canada [13] and by the High Court of Australia.[14]

Mr. Herbert Pope, in a recent article,[15] explains, in an able review of its Parliamentary history, why in England no court exer-

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[12] See L. R. App. Cases, [1912] p. 880.

[13] Todd's Parliamentary Government in the Colonies, pp. 220, 363–366.

[14] See Huddart Parker & Co. *v.* Moorehead, 8 Comw. L. R. 330; The King *v.* Commissioners, id. p. 419.

See also Moore's Constitution of the Commonwealth, 2 ed., pt. 6, ch. 1.

[15] 27 HARV. L. REV. 45.

cises the power to declare an act of Parliament unconstitutional, by showing that not merely is there no written constitution of Great Britain, but that Parliament itself has always exercised judicial powers, and has been and continues to be the highest court of the realm. But under the American state and federal constitutions the legislature possesses no judicial powers, and as Mr. Pope says, "The meaning of the constitution *as law* could be determined only by the judgment of some court, and Congress, under the Constitution, is not a court."

In the construction of constitutional provisions made for the protection of individuals the courts early recognized what Mr. Justice Holmes so well expressed in a comparatively recent case, that —

"In modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that in the working of a statute there is some tendency logically discernible to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made." [16]

In the year 1835, Chancellor Walworth, in deciding a case in the New York Court of Chancery, said:

"But in a state which is governed by a written constitution like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretense that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of eminent domain was an infringement of the spirit of the constitution; and therefore not within the general powers delegated by the people to the legislature.

"But while I deny to the legislative power the right thus to take private property for the mere purpose of transmitting it to another, I admit that the two branches of the legislature, subject only to the qualified veto of the executive, are the sole judges as to the expediency of making police regulations interfering with the natural rights of our citizens, which regulations are not prohibited by the constitution." [17]

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[16] Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 616.

[17] Varick *v.* Smith, 5 Paige's Chancery, 136, 159.

In the great case of Commonwealth *v.* Alger, 7 Cush. (Mass.) 53, Chief Justice Shaw, with that masterful grasp on principles of law and government that always characterized him, analyzed and expounded the relation between constitutional provisions, adopted for the preservation of individual rights, and the powers of government by which those rights must be qualified, in order that, without impairment of the substantial and essential rights of the individual in a free state, government may nevertheless go forward and discharge its necessary functions for the benefit of society at large — the commonwealth.

"We think it is a settled principle," he said, "growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

He added:

"It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable." . . . (Pp. 84–86.)

The limits of the case under consideration did not lead the Chief Justice to a discussion of the many other cases where the fitness of the exercise of such power is not so obvious that its reasonableness would be agreed to by "all well-regulated minds."

In the year 1837 the same principle was recognized by the Supreme Court of the United States, in a case involving the constitutionality of a state statute requiring the master of every vessel bringing immigrants from any other country, to report to the authorities of the state in which the port of arrival was situated certain facts concerning such immigrants. It was claimed that this statute amounted to a regulation of foreign commerce, and therefore was invalid, because in conflict with the power over that subject conferred upon Congress by the federal Constitution. In holding that it did not so conflict, the court, by Justice Barbour, affirmed —

"That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive." [18]

In Prigg *v.* Commonwealth, 16 Peters (U. S.) 539, in holding unconstitutional and void an act of the legislature of Pennsylvania, purporting to punish as a public offense against the state the act of seizing and removing a slave by his master, which the court held the Constitution of the United States was designed to justify and uphold, Mr. Justice Story said:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in

[18] City of New York *v.* Miln, 11 Peters (U. S.) 102, 139.

any manner whatsoever to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the Constitution of the United States, and owes its whole efficacy thereto. We entertain no doubt whatsoever that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases the operations of this police power, although designed generally for other purposes, for the protection, safety, and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same." (P. 625.)

In giving scope to the exercise of this so-called police power the Supreme Judicial Court of Massachusetts has been, perhaps, more scrupulously regardful of the limitations upon its exercise imposed by constitutional restrictions than the courts of any other state. Chief Justice Knowlton, in the case of Commonwealth *v.* Strauss, 191 Mass. 545, 550, defined this power as including "the right to legislate in the interest of the public health, the public safety, and the public morals. If the power is to be held within the limits of the field thus defined," he said, "the words should be interpreted broadly and liberally. If we are to include in the definition, as many judges have done, the right to legislate for the public welfare, this term should be defined with some strictness so as not to include everything that might be enacted on grounds of mere expediency."

The legislature of Massachusetts has also exhibited a commendable desire to restrain its action within the boundaries of constitutional power, by frequently requesting the opinions of the justices of the Supreme Court as to the constitutionality of measures proposed to be justified under the exercise of the police power, and

in every instance, so far as the writer has been able to ascertain, the legislature has acquiesced in the expression of opinion thus invoked.[19]

The adoption of the Thirteenth and Fourteenth Amendments to the United States Constitution, particularly the provision forbidding states to make laws which shall abridge the privileges or immunities of citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny to any person within the jurisdiction the equal protection of the laws, forced upon the Supreme Court of the United States a more careful and comprehensive consideration of the limits of the police power than previously had been incumbent upon that tribunal. In a line of cases, too well known to require or justify enumeration here, the Supreme Court has analyzed and discussed the extent to which constitutional prohibitions or fundamental principles are and must be modified by that uncertain reserve power in the states known as the police power. It should be remembered that the whole doctrine of the police power is of judicial origin; that no provision in the Constitution of the United States, nor, so far as the researches of the present writer have shown, in that of any state, expressly limits or qualifies the declaration of the rights which they purport to secure to individuals, by the further declaration that any law which the legislature may choose to enact for the avowed purpose of protecting public health, public safety, or public morals, or of providing for the general public welfare, shall be valid, notwithstanding any effect which such law may have upon the rights guaranteed by the Constitution.

There are in many of the modern State constitutions provisions expressly subordinating all corporations to the police power. Such provisions are generally expressed in such language as the following—

"The police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State." [20] Such provisions, obviously, are intended, not to weaken, but to strengthen provisions in the Bills of Rights in behalf of individuals.

[19] See 200 Mass. 619, 622; 211 Mass. 605; 207 Mass. 601; id. 606; 211 Mass. 618.

[20] See constitutions of Pennsylvania (1873), North Dakota (1889), Montana (1889),

The wisdom and the necessity of the creation of some such doctrine as that of the police power may well be recognized; but in that recognition credit also should be given to the sagacity of the judges who first perceived the impossibility of carrying on government without some such lubricant, and who therefore formulated and applied the theory of the police power.

Criticism of the failure of the judiciary to extend this principle in some instances to particular cases of novel and experimental legislation for social betterment should be silenced by a recognition of the far-seeing statesmanship which first led courts by the application of "the rule of reason" to enunciate the doctrine of the police power and the necessity of so applying it as not to override express constitutional provisions.

In the Slaughter-House Cases, 16 Wall. (U. S.) 36, in which the doctrine first received extensive consideration by the Supreme Court after the adoption of the Fourteenth Amendment, Mr. Justice Field, in his dissenting opinion, said:

> "With this power of the state and its legitimate exercise I shall not differ from the majority of the court. But under the pretense of prescribing the police regulation the state cannot be permitted to encroach upon any of the just rights of the citizens, which the Constitution intended to secure against abridgment." (P. 87.)

No student of the history of the legislation enacted, and that sought to be justified under this power, can fail to recognize that the apprehension suggested in this statement has been realized, and that the rights intended to be secured to citizens under state and federal constitutions have been and are being continually encroached upon in the interests of what is vaguely known as "the public welfare."

If the views suggested by Mr. Justice Holmes, in dissenting from the majority opinion in Lochner *v.* New York, [21] should prevail, and courts be held to have "nothing to do with the right of a majority to embody their opinions in law," written constitutions

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Mississippi (1890), Kentucky (1890), Virginia (1902), South Dakota (1898), Louisiana (1898), Idaho (1889). The constitutions of Wyoming (1889) and New Mexico (1911) contain a clause, "The police power of the state is supreme over all corporations as well as individuals." (Thorpe's constitutions.)

[21] 198 U. S. 45, 75.

had better be avowedly and formally abolished, as bills of rights would then become mere mockeries.

But such views have not always prevailed, although they certainly have affected the modern tendency of decision in the Supreme Court.

Professor Freund [22] defines the term "police power" "as meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property."

Professor Tiedeman, in the preface to his treatise on "State and Federal Control of Persons and Property in the United States," says that the police power is properly confined to the detailed enforcement of the legal maxim *sic utere tuo ut alienum non lædas*, and he quotes, with approval, a passage from an opinion of Judge Henshaw in the Supreme Court of California, in which that judge says that while the police power is one whose proper use makes most potently for good,

> "In its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant."[23]

In Bartemeyer *v.* Iowa, [24] Mr. Justice Field, who had dissented from the decision of the court in the Slaughter-House Cases, in an opinion concurring with the majority, stated the position of the judges who had dissented in those cases to be, not that they contended that the Fourteenth Amendment *interfered* in any respect with the police power of the state or was adopted for any such purpose; but that under the pretense of prescribing a police regulation the state could not be permitted to encroach upon any of the just rights of the citizens which the Constitution intended to guard against abridgment; and because in their opinion the act of Louisiana under consideration in the Slaughter-House Cases went far beyond the province of a police regulation and created an oppressive and odious monopoly they regarded it as unconstitutional.

In almost every case in which the constitutionality of legisla-

[22] Freund, The Police Power, Preface.
[23] 112 Cal. 468, 473.
[24] 18 Wall. (U. S.) 129.

tion sought to be held under the police power has been considered by the Supreme Court, the court has taken pains to declare that a state cannot, under the pretense of the exercise of the police power, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land.[25]

But, as Mr. Justice Holmes said in Otis *v.* Parker [26] —

"General propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree."

In the case of Holden *v.* Hardy [27] the court, in discussing the question whether or not a state law violated the due process clause of the Fourteenth Amendment, referred to many local reforms which had been enacted in the states, saying that they were mentioned only for the purpose of calling attention to a probability that other changes of no less importance might be made in the future,

"and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land." (P. 387.)

This case perhaps was the first one to suggest that the doctrine of expediency should control the judgment of the court in measuring state enactments with constitutional requirements. The premise upon which it was based has been proved untenable by a recent demonstration, in the adoption of two constitutional amendments within a short time of their proposal, that the Constitution of the United States may be easily amended *when a substantial majority of the people desire it to be done.*

In an earlier case, the Supreme Court repudiated the proposition that a state, in the face of the Fourteenth Amendment, could

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[25] See Beer Co. *v.* Mass., 97 U. S. 25, 28; Butchers' Union *v.* Crescent City Co., 111 U. S. 746, 754; Lochner *v.* New York, 198 U. S. 45.

[26] 187 U. S. 606, 608.

[27] 169 U. S. 366.

make due process of law of anything which it chooses to declare as such, saying:

"To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation." [28]

But the *opinion*, if not the actual *decision*, in Holden *v.* Hardy is scarcely consistent with this reservation, and in Railroad Co. *v.* Drainage Commissioners [29] the court, speaking by Mr. Justice Harlan, said (P. 592):

"We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. . . . And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."

A comprehensive review of the decisions of the Supreme Court respecting state legislation attacked as in violation of provisions of the Constitution of the United States on the one hand, and on the other sought to be upheld under the police power, has been recently made by Mr. Charles Warren in an article in the Columbia Law Review for April, 1913, entitled "The Progressiveness of the United States Supreme Court." The writer shows that out of more than 560 cases considered by the court between 1887 and 1901, there were only 30 cases where a state law or action was held unconstitutional, and that of these 30, only 4 were cases sought to be upheld under the general welfare theory. Indeed, the enumeration of the cases in which state action has been upheld, set forth by Mr. Justice Hughes in the opinion of the court in Railroad Co. *v.* McGuire,[30] illustrates the wide scope for the exercise of state legislative effort to improve social conditions which the Supreme Court recognizes; for its only limits, in the direction under discussion, would seem to be that the legislative action must not

[28] Davidson *v.* New Orleans, 96 U. S. 97.
[29] 200 U. S. 561.
[30] 219 U. S. 549, 569.

be arbitrary, or have no reasonable relation to a purpose which it is competent for government to effect.

This is in harmony with what was said by Mr. Justice Brown in Lawton *v.* Steele,[31] at least so far as that statement goes, viz.:

"The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual, or unnecessary restrictions upon lawful occupations. . . .

"To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, secondly, that the means are reasonably necessary for the accomplishment of the purpose, and are not unduly oppressive upon individuals."

The recognition by the courts of an undefined and undefinable power in the legislature, qualifying the declaration of fundamental individual rights, does indeed impose an arduous duty upon the judiciary in determining when even this wide area of legislation is departed from in the effort to secure utopian conditions through legislation. On the other hand, it opens such a wide and undefined pathway around constitutional restrictions, that nothing but constant vigilance, careful analysis, and inflexible obedience to the spirit and intent of constitutional mandates on the part of the judiciary can prevent the gradual but effective impairment of their force. If the scope attributed to the police power by Mr. Justice Holmes in the Oklahoma Bank Guaranty Cases[32] is to prevail, it is hard to see what restrictions upon legislative effort to promote the social welfare still remain, short of the crude appropriation of individual property for private, as distinguished from public, purposes. "It may be said in a general way," runs his opinion in that case, "that the police power extends to all the great public needs. Camfield *v.* United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." Yet that the learned justice recognized that this broad statement requires some qualification is evidenced by his further observation:

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[31] 152 U. S. 133, 137.

[32] Noble State Bank *v.* Haskell, 219 U. S. 104, 112.

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. . . . It will serve as a datum on this side, that in our opinion the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line."

In an earlier case [33] the Supreme Court declared that while "the right to exercise the police power is a continuing one . . . yet the exercise of this power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment."

In every case, the courts at all events must inquire[34] "whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for unjust discrimination, or the oppression or spoliation of a particular class."[35]

So far from the Supreme Court being open to fair criticism for giving unduly narrow construction to constitutional provisions in favor of individual rights, as against measures designed for the public welfare, a more candid criticism might suggest that that great tribunal in common with other courts had yielded somewhat unduly to public criticism in giving effect to legislation, which, however desirable from the standpoint of social reform, yet involves a measurable encroachment upon some of those individual rights to secure which the Fourteenth Amendment was adopted.

Modern criticism of courts apparently proceeds upon the theory that constitutional provisions shall be enforced only until a certain number of people who are able to give expression to their views in newspapers, magazines, and on the lecture platform shall contend that some other principles should control legislative action. The theory of the framers of constitutions in the past has been that their provisions were to be more than temporary in duration, and that they should be respected and enforced, until a sufficiently large number of people should disagree with them to bring about a modification of the constitution in the method provided in such instru-

[33] Dobbins *v.* Los Angeles, 195 U. S. 223–239.

[34] Holden *v.* Hardy, 169 U. S. 366, 398.

[35] See also Dobbins *v.* Los Angeles, *supra*, and cases cited on pp. 236–238.

ment; and that the question whether or not legislative or executive action exceeded constitutional limitations should not be left to the final determination of those acting, but, when arising in the course of litigation, should become a judicial question, to be determined by the courts of justice. This has been the American theory of constitutional government; and it is interesting to note that the same theory was deliberately adopted in one of the newest and, in some respects, the most radical of English federations, — Australia.

In the convention which framed the constitution of the Commonwealth of Australia it was proposed that when any law passed by the Commonwealth Parliament was declared unconstitutional by a decision of the High Court, the executive might, upon the adoption of a resolution by absolution majorities in both houses, or in one house alone, refer the law to the electors for their approval, and, if so approved, that the same should become a law notwithstanding the constitution — in effect Colonel Roosevelt's proposition for the recall of judicial decisions.

But Mr. Moore, in his work on the "Constitution of the Commonwealth," says:

"The proposal received no support, and the maintenance of the individual right to impugn laws is the more significant because in other respects the constitution differs markedly from the Constitution of the United States in not establishing rights of individuals against governmental interference." [36]

The constitution, as adopted, expressly empowered the Parliament, "subject to this constitution," "to make laws for the peace, order, and good government of the Commonwealth, with respect to" certain enumerated subjects, and authorized Parliament to confer original jurisdiction upon the High Court in any matter "arising under this constitution, or involving its interpretation." Not only was the finality of judicial interpretation of constitutional power recognized as incident to the ordinary administration of justice, but it was also provided that under certain conditions the executive or the legislature might require the opinions of the justices of the High Court upon constitutional questions, and it was further declared —

[36] See Moore's Constitution of the Commonwealth, 2 ed., Melbourne, 1910, p. 360.

"No appeal shall be permitted to the Queen in Council from the decision of the High Court upon any question howsoever arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or states, or as to the limits *inter se* of the constitutional powers of any two or more states, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council." [37]

It would be well if the exercise of the police power could be limited by the test often enunciated, but not always followed, of reasonableness, as distinguished from arbitrary or capricious action.[38]

But the pressure is very great on the part of social reformers to compel legislation which transcends constitutional restrictions, and seeks justification under the elastic boundaries of the police power, and any interference with their programs by decisions of courts based upon constitutional limitations is received by them with impatience, and provokes them to intemperate attacks on judges and the exercise of the judicial function just described. The leader of the radical movement against the judicial enforcement of constitutional limitations has declared his belief that courts should continue to have the power to declare void unconstitutional legislation, but, he adds, "only provided the power is exercised with the greatest wisdom and self-restraint."[39] If the continued existence of governmental functions were to be dependent upon officials always exercising powers vested in them "with the greatest wisdom and self-restraint," it may be questioned how long government could continue. Certainly there have been times when the executive office under such a test would have had to go into commission. There are infirmities in all human institutions, but government is an exceedingly practical business. The framers of our institutions believed that the welfare of society would suffer if the legislature had unlimited power. When the states became members of a federal union the short experience under the original Articles of Confederation demonstrated

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[37] See Edgerton, Federations and Unions Within the British Empire, Oxford, 1911, pp. 58, 66, 212, 214.

[38] State *ex rel.* Davis *v.* Clausen, 117 Pac. 1101.

See also "Judicial Construction of Fourteenth Amendment," by Francis J. Swayze, 26 HARV. L. REV. 1.

[39] The Outlook, *supra*, Jan. 6, 1912.

the need of a stronger central government, and of some power to prevent either state or national government from encroaching upon the domain assigned to the other. This power was provided in an impartial judicial establishment. Our forefathers had suffered from various kinds of tyranny. They proposed to protect the individual citizen in his life, his liberty, his reputation, and his property, against any form of oppression, and to that end they formulated and embodied in the fundamental law declarations of rights which were to be forever recognized and preserved. The judiciary was made the guardian of those rights. In the discharge of that sacred trust it has sometimes erred; but on the whole it has not allowed the letter to stifle, but has been quickened by the spirit of liberty under law. Mr. Justice Holmes recently said he did not believe the Union would be imperilled if the Supreme Court lost its power to declare an act of Congress void; but he added, "I do think the Union would be imperilled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end."[40]

Whether the power be taken away directly, or be deadened and atrophied in its action by adverse criticism and demagogic clamor, when the judiciary no longer shall feel at liberty to construe the provisions of the fundamental law "in the light of reason," constitutional government, in the sense in which it has been understood for a century and a half, will be at an end, and the doctrine of the police power will have been swallowed up in the capacious maw of unrestrained democracy.

George W. Wickersham.

NEW YORK CITY.

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[40] Speech by Mr. Justice Holmes before the Harvard Law Association, New York, Senate Doc. No. 1106, 62d Cong., 3d session.